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August 6, 1999

BY HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Comments of Ameritech New Media, Inc. in Response to the FCC's *Notice of Inquiry* in CS Docket No. 99-230

Dear Ms. Salas:

On behalf of Ameritech New Media, Inc., ("Ameritech"), enclosed are an original and four (4) copies of Comments in response to the FCC's *Notice of Inquiry* in CS Docket No. 99-230 (Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming).

Pursuant to Paragraph 36 of the *Notice of Inquiry* we have forwarded, by hand delivery, diskette copies of Ameritech's comments to Ms. Marcia Glauberman of the FCC's Cable Services Bureau and to the International Transcription Service (ITS).

Questions concerning this filing may be directed to the undersigned.

Sincerely,

Lawrence R. Sidman

Lawrence R. Sidman

Counsel for Ameritech New Media, Inc.

Enclosures

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Before the
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Washington, DC 20554

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In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming	)))	CS Docket No. 99-230

COMMENTS OF AMERITECH NEW MEDIA, INC.

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August 6, 1999

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EXECUTIVE SUMMARY

Ameritech New Media, Inc. ("Ameritech") continues its efforts to bring viable competition to the multichannel video programming distribution ("MVPD") market, and to provide competitive benefits to consumers. Since last year, Ameritech has increased the number of franchises it holds from 78 to 108, representing an increase in households from one million to 1.7 million. As a result, Ameritech has increased the number of communities in which it operates from 61 to 90, representing an increase of almost 50 percent. In addition, since last year, Ameritech's subscribership has increased from 150,000 to 250,000. As a result of these efforts, Ameritech is now the 23rd largest cable operator in the country.

Ameritech's efforts, as well as those of other new entrants, continue to translate into tangible benefits to consumers. As described below and in Exhibit 1, in community after community, Ameritech's entry has resulted in lower cable rates, additional programming channels, network upgrades, and advanced telecommunications services. In short, competition from Ameritech has resulted directly and almost instantaneously into meaningful and much welcomed benefits to consumers.

As reported in past years, Ameritech and other competing MVPDs continue to be hampered by the anticompetitive tactics of cable incumbents designed to impair the ability of new entrants to compete effectively in the MVPD marketplace. Almost seven years after the enactment of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), cable incumbents continue to enter into exclusive agreements that deny access to popular programming to competing MVPDs. The increasingly prevalent tactic of switching previously satellite-delivered programming to terrestrial distribution is clearly being used by vertically integrated cable companies as a means to evade the program access rules. As Ameritech has stated previously, this anticompetitive strategy will only become more pervasive as the trend towards clustering and consolidation accelerates, making terrestrial distribution more economical.

In addition, cable incumbents continue to obtain popular programming, particularly sports programming, at unjustifiably and significantly lower prices than new entrants, particularly cable overbuilders serving the same market. As a result, new entrants are forced to operate at a tremendous cost disadvantage compared to their larger competitors. Consequently, new entrants are precluded from developing the type of cost structure necessary to offer popular programming to consumers at lower prices over the long term. Unless stopped, this discriminatory pricing behavior will seriously inhibit competition in the video marketplace and potentially even drive some new entrants out of the market altogether.

New entrants also continue to experience particular difficulty in obtaining programming from unaffiliated programmers, often under enormous marketplace pressure from the largest incumbent cable operators. Secure in the belief that the program access rules apply only to vertically integrated programming vendors (and the FCC's unwillingness to hold otherwise), the entrenched cable industry has engaged in unfair and discriminatory tactics that are harmful to competition. The Congress and the FCC must address this issue if they wish to promote widespread competition in the future.

Finally, new entrants, such as Ameritech, continue to face difficulties accessing residents living in multiple dwelling units ("MDUs"), despite the FCC's cable inside wiring rules. As a result, these consumers, often poorer than Americans residing in single family homes, are denied the competitive benefits promised by Congress.

This is not the first time these issues have been raised with the FCC. Year after year, Ameritech and other new entrants have called the Commission's attention to these problems and the destructive effects they have on competition in the MVPD marketplace. Unfortunately, the FCC so far has confined its response largely to chronicling these issues in report after report. Ameritech respectfully submits that the time for monitoring and chronicling has passed. What is needed now is for the Commission to take bold and decisive steps if it hopes to see the growth of meaningful widespread competition in the MVPD marketplace in the future. This report is the perfect place to start. Rather than simply issuing yet another chronicle on the status of MVPDs, the Commission should use this proceeding to reexamine the effectiveness of its program access and MDU rules to foster competition in the MVPD market. As part of this reexamination, the FCC should identify specific actions it will take to address the problems faced by competing MVPDs, including overbuilders such as Ameritech. Where the FCC determines that it lacks jurisdiction to act, it should make specific recommendations to Congress on the action it should take. This approach is consistent with the underlying purpose of the annual report requirements and statutory mandate which is to examine and identify methods needed to foster competition and not merely to recite, year after year, the same dreary depiction of the painfully slow growth of genuine competition to incumbent cable operators.

Simply put, the time has come for the FCC to fulfill its promise to Congress to "promote competition in **all** sectors in the marketplace."[1] Time is increasingly of the essence in light of the

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[1] Federal Communications Commission's Fiscal year 2000 Budget Estimates, Hearing Before the Subcommittee on Commerce, Justice, State and the Judiciary Committee on Appropriations, U.S. House, 106th Cong., 1st Sess. (April 14, 1999) (Statement of FCC Chairman (continued...)

upcoming sunset in only three years of the exclusive contract provisions of 47 U.S.C. § 548(c)(2)(D).[2] The Commission has been extremely vigorous in its efforts to foster competition in the local telephone market in the past three years, but that vigor has not been replicated with regard to competition to incumbent cable operators, even though consumers around the country express far greater concern about the price and quality of their cable service than their local telephone service. Moreover, the FCC cannot simply declare victory in light of the development of DBS. For many consumers, the cost of DBS, both in terms of equipment and programming, remains prohibitively high. Further, as FCC Commissioner Gloria Tristani noted in her statement on the *Fifth Annual Report*, DBS does not present a viable alternative to those consumers who do not want or cannot use large programming packages. "It shows how starved we are for competition that anyone could look at the competitive choice provided by DBS and declare victory."[3] The FCC must refocus its attention – substantively and seriously – on achieving competition in the MVPD marketplace. Only then will consumers receive the benefits promised by Congress.

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[1](...continued)
William E. Kennard).

[2] 47 U.S.C. § 548(c)(5) ("The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."). This section was enacted on October 5, 1992. Thus, absent Commission action, the provision will sunset on October 5, 2002.

[3] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 98-102, *Fifth Annual Report*, 13 FCC Rcd 24284 (1998) (Statement of FCC Commissioner Tristani at 2).

Before the
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In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in the Markets for the	)	
Delivery of Video Programming	)	

COMMENTS OF AMERITECH NEW MEDIA, INC.

I. AMERITECH AND OTHER NEW ENTRANTS CONTINUE THEIR EFFORTS TO PROVIDE MEANINGFUL COMPETITION IN THE MVPD MARKETPLACE.

Ameritech New Media, Inc. ("Ameritech"), pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") rules,[4] hereby submits its comments in response to the FCC's *Notice of Inquiry* in the above-captioned proceeding.[5]

As in the past, Ameritech continues to do its part to bring meaningful competition to the MVPD marketplace. In the past year, Ameritech has increased the number of communities in which it holds a franchise from 78 to 108, representing an increase in households from one million to 1.7 million. In addition, it has increased the number of communities in which it operates from 61 to 90, representing an increase of almost 50 percent. Moreover, since last year Ameritech has increased the number of subscribers served from 150,000 to 250,000. As a result, Ameritech is now the 23rd largest cable operator in the country.[6]

Ameritech's entry into these additional communities has translated into meaningful

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4 47 C.F.R. § 1.415.

5 Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, *Notice of Inquiry*, FCC 99-148 (released June 23, 1999).

6 *Broadcasting and Cable*, May 24, 1999, ¶¶ 3-4.

benefits to consumers. For example, as reflected in Exhibit 1, before Ameritech launched service in Brooklyn, Ohio earlier this year, Cablevision offered a cable package (expanded basic, equipment, the Disney Channel, and one premium channel) for a total price of $50.33.[7] After Ameritech's entry, Cablevision added 24 channels to its expanded basic service and lowered the price of its total cable package from $50.33 to $36.90.[8]

Similar competitive benefits materialized in Rochester, Michigan as a result of Ameritech's entrance into that community. As detailed in Exhibit 1, before Ameritech's entry into Rochester, Michigan, AT&T/TCI offered a cable package (expanded basic, equipment, and one premium channel) for a total price of $50.48. After Ameritech's entry, AT&T/TCI's total package price dropped from $50.48 to $39.40.[9] Competitive benefits materialized in other communities as a result of Ameritech's entry as well.[10]

These significant competitive benefits did not accrue to consumers in communities where Ameritech does not provide service. For example, in Independence, Ohio, Cablevision continues to charge a total package price of $50.69 for a channel line-up nearly identical to that offered in nearby Brooklyn, Ohio for $36.90.[11] Similarly, in Auburn, Michigan, AT&T/TCI continues to charge consumers a total package price of $45.98 for a channel line-up identical to that offered in

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7 *See* Exhibit 1 for Examples of Competitive Response To Ameritech Market Entry.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

nearby Rochester, Michigan for $39.40.[12]

Cable incumbents also have engaged in promotional activities in response to competition from Ameritech. For example, AT&T/TCI now offers digital services and equipment valued at $162.60 to subscribers at no cost for one year. Similarly, Time Warner has offered subscribers three months of free expanded basic service and two premium channels for the price of one (a package valued at $200) for one year. Harron Communications has offered subscribers a package consisting of expanded basic, equipment, and all premiums, (a package valued at $240), for only $50 per month for one year. Insight Communications now offers expanded basic and HBO for $19.95 per month for 12 months.

As demonstrated above, Ameritech's entry into the MVPD marketplace has allowed many consumers to reap the benefits of competition such as lower cable prices, additional programming channels, network upgrades, and advanced telecommunications services. In short, competition from Ameritech has translated directly and almost instantaneously into tangible and much welcomed benefits for consumers. These benefits simply do not accrue to consumers who are subject to the whim of only their incumbent cable operator.

Ameritech is not the only new cable entrant igniting competition in the MVPD marketplace. RCN Corp. ("RCN"), an Open Video Systems operator, in recent weeks has signed a 15-year franchise for Boston, Massachusetts, adding another market to the many others that it currently serves.[13] This franchise promises to bring much needed competition against incumbent Cablevision in the Boston area. In addition, Starpower Communications, ("Starpower") a joint

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12 *Id.*

13 L. Haugsted, "Boston Pact Caps Busy Week for RCN," *Multichannel News*, at 3 (August 2, 1999) ("*RCN*").

venture between RCN and Pepco Communications, a subsidiary of Potomac Electric Power Company, recently launched service in Gaithersburg, Maryland, which is served by incumbent operator Cable TV Montgomery.[14] In addition, Starpower recently obtained another franchise, this one to offer cable service in the remaining portions of Montgomery County, Maryland.[15] This new franchise agreement permits Starpower to "give nine of every 10 county households a choice of cable service" and "ends Cable TV Montgomery's 16-year monopoly in Maryland's largest jurisdiction."[16] Starpower offers a 94-channel basic package priced at $31.95, or $5 a month less than the 65-channel basic cable lineup offered by Cable TV Montgomery. With planned additional offerings, Starpower's programming package will expand to 140 channels, including 16 premium, 18 digital and 12 pay-per-view.[17]

In addition, Seren Innovations, Inc. ("Seren") recently was authorized to launch an overbuild of AT&T Broadband & Internet Services in the San Francisco East Bay community. Seren plans a fiber-coaxial network capable of delivering a discounted package of cable, high-speed Internet access and telephone services.[18] This franchise is in addition to that held by Seren in St. Cloud, Minnesota. RCN and Seren are only two examples of a long list of new entrant competitors to incumbent cable that includes BellSouth, GTE, U.S. West, Southern New England

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[14] *Id.*, at 50.

[15] S. Wilson, "Montgomery Allows Cable Competition," *Washington Post*, at B9 (August 4, 1999).

[16] *RCN, supra.*

[17] *Id.*

[18] Jason B. Johnson, "Midwest Upstart Lays out Competition for TCI; Cable Company Seren Innovations signs in Concord," *The San Francisco Chronicle*, at A17 (July 29, 1999).

Telephone, electric utility companies, and municipalities.

These examples demonstrate that cable overbuilders are providing real competition in communities in which they serve. This head-to-head competition produces more immediate and pronounced benefits for consumers than those provided by DBS, which historically has had negligible impact on incumbent cable rates, and provides competitive benefits only to those consumers who desire and can afford large programming packages. As FCC Commissioner Tristani has stated previously, "[i]t shows how starved we are for competition that anyone could look at the competitive choice provided by DBS and declare victory."[19]

II. NEW ENTRANTS CONTINUE TO FACE ANTICOMPETITIVE MISCONDUCT BY CABLE INCUMBENTS WHICH IMPEDES THE GROWTH AND ROBUSTNESS OF COMPETITION

A. Cable Incumbents Continue to Use Exclusive Contracts to Deny Program Access.

As Ameritech and other competing MVPDs have reported in previous years, incumbent cable operators continue to enter into exclusive distribution agreements that deny access to popular programming to new entrants such as Ameritech. Of particular note, exclusive contracts with <u>un</u>affiliated programmers appear to be on the rise and pose genuine obstacles to the emergence of a truly competitive marketplace. The evidence suggests that the continued market power of incumbent cable operators is spurring this trend. In essence, incumbent cable operators are extracting exclusivity from unaffiliated vendors and using these exclusivity arrangements as an anticompetitive sword against competitors. This is certainly the type of unfair method of competition Section 628(b) was designed to prevent.

For example, Ameritech has been unable to carry the Ohio News Network ("ONN")

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19 Statement of FCC Commissioner Tristani at 2.

(unaffiliated, regional cable news network in Ohio) in the Cleveland area because ONN has an exclusive agreement with Cox Cable. Similarly, Ameritech has long been denied access to TV Land, an increasingly popular cable network owned by Viacom, because of exclusive distribution arrangements with incumbent cable operators. The anticompetitive effect of this denial of access was exacerbated by Viacom's aggressive promotion of TV Land on Nickelodeon, a cable network Ameritech does carry. Since Viacom is no longer affiliated with cable systems, it possesses the power to inflict even more anticompetitive damage by denying competitive MVPDs access to such programming as Nickelodeon and MTV. Ameritech also has been precluded from carrying the Chicagoland TV network ("CLTV"), a 24-hour cable news network channel. This is the result of a programming arrangement between CLTV, an unaffiliated programmer owned by the Tribune Company, and AT&T/TCI that effectively precludes any competitor from carrying CLTV on its systems in the Chicago area.

These tactics have also threatened Ameritech's continued carriage of popular sports programming. Ameritech was nearly forced to drop Classic Sports Network ("CSN") last year when CSN entered into an exclusive carriage agreement with incumbent cable operators, including MediaOne. This exclusivity arrangement was particularly surprising because CSN had been carried by Ameritech on a non-exclusive basis since Ameritech initiated its cable operations. Only after Ameritech filed a program access complaint against MediaOne, *et al.*, did the incumbent operators agree not to enforce the exclusivity provisions of their contracts against Ameritech, ensuring that Ameritech could continue to carry this very popular programming.

Ameritech also has been stymied in its efforts to assemble desirable programming packages by its inability to obtain popular cable networks owned by broadcasters, such as

MSNBC and Fox News Channel. These networks have refused to permit Ameritech to carry their programming because of exclusive distribution arrangements with incumbent operators.[20]

B. The Use of Exclusive Contracts Is Exacerbated By Increased Use of Terrestrial Distribution to Circumvent the Program Access Rules.

In comments for both the *Fourth Annual Report* and the *Fifth Annual Report*, Ameritech and other MVPDs warned the FCC that incumbent cable operators were busily developing business plans that would have the effect of evading the program access rules, thereby permitting the programming distributed by terrestrial means to be tied-up in exclusive contracts and kept from competitors like Ameritech.[21] As Ameritech explained then, the trend towards terrestrial distribution likely will increase as a consequence of several important marketplace factors such as clustering and the acquisition of sports teams by vertically integrated cable companies. In addition, Ameritech noted that companies such as AT&T, through its ownership of cable companies such as TCI and now, if approved, MediaOne, will have access to substantial amounts of fiber plant that can be used for transporting cable programming.[22]

Of particular note, Ameritech specifically predicted that this anticompetitive behavior would likely occur in major markets, such as New York and Philadelphia, where cable incumbents had increased their marketing power through franchise swaps and clustering arrangements, and

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20 It is our understanding that, in some of these cases, the exclusivity provisions are slated to expire soon. Ameritech is hopeful that, at that time, it will be able to obtain this programming.

21 *See* Comments of Ameritech New Media, Inc., In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Programming *(Notice of Inquiry* in CS Docket No. 96-133, 11 FCC Rcd 7413 (1997)), at 18, 19. *See also* Comments of Ameritech New Media, Inc., In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Programming *(Notice of Inquiry* in CS Docket No. 98-102, 13 FCC Rcd 13044 (1998)), at 24-26 ("Ameritech Fifth Annual Report Comments")

22 Ameritech Fifth Annual Report Comments, at 26.

also had acquired interests in key professional sports teams and arenas.[23]

The FCC, in both annual reports and in its *Program Access Report and Order*, chose not to take any specific action on this issue, but instead stated that "the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace"[24] and that the Commission would "continue to monitor this issue and its impact on competition in the video marketplace."[25]

As evidenced by recent program access complaints filed with the FCC by Microwave Satellite Technologies, Inc. and RCN Telecom Services of New York, Inc,[26] Ameritech's predictions have, unfortunately, become a dim reality. Both complaints charge that Cablevision Systems Corporation in New York, MSG Sports Network, Inc., and Fox Sports Network - New York changed previously satellite delivered sports programming to terrestrial distribution in an effort to evade both the statutory and regulatory program access obligations.[27]

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23 *Id.*, at 24-25.

24 Implementation of the Cable Television Consumer Protection and Competition Act of 1992, CS Docket No. 97-248, *Report and Order*, 13 FCC Rcd 15822, at ¶ 71 (1998) ("*Program Access Report and Order*"). *See also*, *Fifth Annual Report*, at 9 ("[w]e recognize that the issue of terrestrial distribution of programming, including in particular sports programming could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace. We will continue to monitor this issue and the impact on the competitive marketplace.")

25 *Fifth Annual Report*, at 9. *See also Program Access Report and Order*, at ¶71.

26 *See* Program Access Complaint filed by Microwave Satellite Technologies, Inc. v. Cablevision Systems Corporation, MSG Sports Network, Inc., Fox Sports Network - New York and Rainbow Programming Holding, Inc., filed July 8, 1999; Program Access Company of RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, MSG Sports Network, Inc. and Fox Sports Network, CSR-5404-P (filed May 7, 1999).

27 *Id.*

These complaints clearly demonstrate that terrestrial distribution of programming coupled with the use of exclusive agreements is no longer a theoretical concern, but a real and substantial threat to MVPD competition. The time for monitoring this disturbing trend has passed; the time for FCC action to remedy this anticompetitive practice is at hand.

As Ameritech stated previously, this anticompetitive behavior will only become more prevalent as the trend towards increased consolidation and clustering of cable system ownership escalates. This trend is clearly underway in other major cities which, after the completion of various systems swaps and mergers, will be dominated by only a few or, in some cases, only one cable operator. For example, as the maps in Exhibit 2 demonstrate, as of July 1, 1999, Chicago, Illinois was served by seven cable incumbents: AT&T/TCI, Time Warner, MediaOne, Jones Communications, Multimedia, Prime Cable, and Optel.[28] However, after the completion of several system swaps and purchases, it is expected that AT&T/TCI will own virtually all of the cable systems serving the Chicago area.[29] As a result, AT&T/TCI will have access to virtually all of the cable fiber plant in the Chicago area, clearly making transmission of cable programming via terrestrial distribution more economically feasible. Similar consolidation has been planned for other major markets and will likely have the same results.

This trend in consolidation and clustering also will result in increased market power by these large MSOs who will, after the completion of these transactions, amass control over an even more substantial number of subscribers in a given market. This dominance will undoubtedly be used to extract exclusive contracts and other unfair practices from programming vendors to the

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[28] *See* Exhibit 2, Map 1.

[29] *See* Exhibit 2, Map 2.

disadvantage of competing MVPDs, such as Ameritech. The confluence of these factors will lead inevitably to reduced effectiveness of the program access provisions until the loophole for terrestrially delivered programming is closed. There is absolutely no public policy justification for treating precisely the same kind of anticompetitive conduct differently simply because the programming is distributed by satellite in one community and terrestrially in another.

C. Cable Incumbents Continue to Extract Unjustifiably Large Price Discounts From Programming Vendors for the Same Popular Programming Purchased At Much Higher Prices by New Entrants.

Price discrimination remains a major obstacle to meaningful competition in the video marketplace. Despite Section 628's provisions generally prohibiting price discrimination in the sale and delivery of programming, cable incumbents increasingly are able to obtain popular programming at large price discounts, to the tremendous disadvantage of competing MVPDs, including those serving the same markets as the large incumbents. Ameritech itself has been and continues to be the victim of such price discrimination.[30] As Ameritech reported in its *Horizontal Ownership* comments, a study conducted by James N. Dertouzos and Steven S. Wildman ("Dertouzos/Wildman Study") demonstrated that cable incumbents are able to negotiate substantial discounts for popular programming -- discounts which, because of their size, are not available to new entrants.[31] Specifically, the Dertouzos/Wildman Study revealed massive, non-

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30 *See e.g., Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc.*, 12 FCC Rcd 15209 (1997).

31 Comments of Ameritech New Media, Inc., In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, (*Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 92-264, 13 FCC Rcd 14462 (1997)) at Attachment 2 ("Ameritech Horizontal Ownership Comments")

cost justified price differentials between new entrants and cable incumbents.[32] For example, a study of rate cards for six networks revealed maximum discount rates from approximately three to 24 percent while the number of subscribers required to qualify for such discounts ranged from 1.5 million to five million.[33] The study also examined industry discounts offered by 19 basic programming networks, as reported by Paul Kagan Associates. This examination revealed industry discounts ranging from 14 to 91 percent and a mean discount of 45 percent.[34]

The findings of the Dertouzos/Wildman Study are supported by a recent General Accounting Office (GAO) study on the impact of sports programming costs on cable television rates.[35] In that report, GAO found that "small cable operators are likely to pay more for sports programming than large cable operators."[36] In its findings, GAO cited the negotiation power of large incumbent cable operators as the primary reason for these discounts.[37] New entrants and other small MVPDs lack such negotiation power. Indeed, while large incumbents are able to negotiate substantial price discounts, new entrants, which tend to have fewer subscribers (and, therefore, less marketing power) are often offered sports and other types of popular programming

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32 Ameritech Horizontal Ownership Comments, at Attachment 2.

33 *Id.*, at Attachment 2 at 5-6.

34 *Id.*, at Attachment 2 at 7-9. The networks examined included: CNN, ESPN, The Family Channel, The Nashville Network, The Discovery Channel, USA, Nickelodeon, TNT, MTV, Arts and Entertainment, Lifetime, The Weather Channel, Country Music Television, VH1, CNBC, The Learning Channel, BET, Sci-Fi, and E!

35 General Accounting Office, "Telecommunications, Impact of Sports Programming Costs on Cable Television Rates," Report to the Honorable Byron L. Dorgan, U.S. Senate (June 1999) ("*Sports Programming Report*").

36 *Sports Programming Report*, 1, 11.

37 *Id.*

on a "take it or leave it" basis.

These price differentials result in crippling cost disadvantages for new entrants. As Ameritech noted in its *Horizontal Ownership* comments, a 100,000 subscriber MVPD providing the 19 networks examined in the Dertouzos/Wildman Study would face an annual programming cost disadvantage of as much as $3.9 million, or just under $39 per subscriber per year compared to a cable incumbent -- more than a one month subscription.[38] Price differentials of this magnitude cannot be justified by cost or economies of scale principles.[39] Indeed, Ameritech can think of no factors that would justify volume discounts anywhere near this magnitude, particularly where the large incumbent and new entrant serve the same market.

These significant, systematic price differentials have a direct adverse impact on competition. These discriminatory practices force new entrants to pay more for programming than they should or than their large incumbent competitors do. As a result, new entrants are significantly hampered in their efforts to compete viably in the video marketplace. The anticompetitive impact of such price discrimination is magnified because so much of the most popular cable programming continues to be controlled by vertically integrated cable companies. Thus, not only does Ameritech have a higher cost of doing business than AT&T/TCI or Time Warner because of higher programming costs, not benefitting from discounts, but the increased sums flowing into these companies' cable programming networks serve to subsidize these incumbents' operations. In short, there is a compounding effect associated with price discrimination which creates a severe, unfair and unlawful competitive disadvantage. It is a real

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38 Ameritech Horizontal Ownership Comments, at Attachment 2 at 9.

39 *Id.*, at Attachment 2 at 10-18.

and formidable barrier to the development of a truly competitive MVPD marketplace.

And, most importantly, consumers, the intended beneficiaries of competition as envisioned by the 1992 Cable Act, are the real losers as a result of these discriminatory practices. Competing MVPDs who are forced to pay unjustifiably higher programming costs than they should or than their incumbent competitors, **cannot** continue to provide viable, rate constraining competition. As long as new entrants continue to suffer such clear and gross discrimination in prices, terms and conditions in the purchase of programming, consumers will be denied the full benefits of competition. The potential long term threat of sustained price discrimination is even more pernicious because it could well drive new competitors out of the market.

D. New Entrants Continue to Face Difficulties Serving MDUs Despite the FCC's Cable Inside Wiring Rules.

As Ameritech reported last year, alternative MVPDs such as Ameritech still face enormous difficulties accessing consumers residing in MDUs despite the FCC's cable inside wiring rules. These difficulties result because: (1) the FCC's rules effectively ensure that cable incumbents never have to give up ownership of inside wiring; and (2) cable incumbents engage in anticompetitive behavior designed to discourage access to MDU residents by competing MVPDs.

The cable inside wiring rules require an MVPD that no longer has a legally enforceable right to remain on the premises to sell, remove or abandon its wiring.[40] However, as Ameritech noted in its 1998 Competition Comments, many cable incumbents have essentially perpetual agreements, allowing them to provide service to the particular MDU so long as they are franchised to provide service in the relevant community. Thus, so long as a cable incumbent

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[40] Telecommunications Services Inside Wiring, CS Docket No. 95-184, *Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 3659 (1997).